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AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.



July 12, 2010

FAR Secretariat (VPR)
1800 F Street, NW
Room 4041
Attn: Hada Flowers
Washington, DC 20405

Re: FAR Case 2009-004, Enhancing Contract Transparency

On behalf of the Associated General Contractors of America (hereinafter "AGC"), thank you for the opportunity to submit the following comments on the advance notice of proposed rulemaking (hereinafter "ANPR"), that the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (hereinafter the "FAR Councils") issued May 13, 2010. In short, the Councils are seeking input on the development of modifications to the Federal Acquisition Regulation (hereinafter "FAR") to enable public posting of contract actions.

AGC is the leading association for the construction industry. Founded in 1918 at the express request of President Woodrow Wilson, AGC now represents more than 33,000 firms in nearly 100 chapters throughout the United States. Among the association's members are approximately 7,500 of the nation's leading general contractors, more than 12,500 specialty contractors, and more than 13,000 material suppliers and service providers to the construction industry. These firms engage in the construction of buildings, shopping centers, factories, industrial facilities, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, hospitals, water conservation projects, defense facilities, multi-family housing projects, municipal utilities and other improvements to real property. Many of these firms regularly perform construction services for the U.S. Army Corps of Engineers, the Naval Facilities Engineering Command, the General Services Administration and other federal departments and agencies. Most are small and closely-held businesses. Unlike many associations in the industry, AGC proudly represents both union and open-shop construction contractors.

Overall Perceptions of the Proposed Rule

At the outset, AGC wishes to agree in principle with the ideas of increasing accountability and transparency in federal contracting. We agree with the goals of this ANPR and the Councils' expectation that some statutory change is forthcoming that would implement this rule, given the direction the Administration has been heading in and the contracting initiatives it has implemented. However, AGC would like to express its desire that implementation of the product of this ANPR does not become binding until such statutory authority is in place.

Furthermore, AGC would like to request that since there is presently no statutory authority for the implementation of this public posting system, that the comment periods on any products of this ANPR be subject to periods for public comment that are longer rather than shorter. It makes

little sense to have the product of this ANPR subject to a 30-day comment period where a longer one, at least 60 days, would potentially solicit better and more varied perspectives on this issue.

Comments on the Mechanics/Process of Disclosure

AGC understands that while disclosure remains the purpose of the rule, we find it difficult to identify what precisely is going to be made public that is not already publicly available. The majority of information in the contracts is either located in the solicitation at <https://www.fedbizopps.gov> or is stock contract language that is available as part of the FAR at <https://www.acquisition.gov/far> in FAR Subchapter H – Parts 52 and 53. It seems that the majority of information beyond what is in the solicitation and the FAR would be information that should be protected. If the process is to release everything, but redact the protected information, would that not lead to either redacting more than you are posting (making the disclosure a net loser based on effort input), or disclosing nothing more than what is already available (making the net additional disclosure zero and the action pointless), or both?

AGC also questions which contracts would be posted under these disclosure procedures. Would it be all contracts after enactment, or would it be retroactive to contracts entered into before enactment? If it is retroactive, how far back would the disclosure go? Would the disclosure be for contracts that are currently open and active, or would contracts only be posted once they are completed and final payment made?

What Should Be Protected Material/What is a ‘Contract Action’

It is encouraging that "the Councils are considering how best to revise the FAR to facilitate such posting without violating statutory and regulatory prohibitions against disclosing protected information belonging to the Government or contractors." Unfortunately, the ANPR states that "It may not be practical to apply FOIA procedures before posting in every case."

AGC does not know how it would be possible to reconcile the numerous FAR and other statutory and regulatory protections afforded to confidential/proprietary data with any mechanism that would provide less protection than that provided by FOIA and related agency regulations and guidance.

AGC cannot discern anything in the various Memoranda cited in the ANPR that would dictate that the legitimate and laudable movement towards more transparency would suggest, even in the slightest, that there should be any less care taken in protecting confidential information. In fact, the December 9, 2009 OMB memorandum on the Open Government Initiative directly addresses this very concern:

“Nothing in this Directive shall be construed to supersede existing requirements for review and clearance of pre-decisional information by the Director of the Office of Management and Budget relating to legislative, budgetary, administrative, and regulatory materials.”

We believe that the starting point for the evaluation as to which information should be publicly available should be nothing less than FOIA standards for review and redaction, at least with respect to confidential business information, for *all* disclosed contracts.

Material to be Protected

The safeguards suggested by the Councils fall short of applying FOIA procedures and as a result they all bear increased risks of disclosure of protected information. AGC believes that these protections should apply at minimum to:

- Bid Proposals and Source Selection Information - [FAR 3.104-4 and FAR 24.202(a)] – which AGC believes to include design documents, proprietary work processes of Design-Build proposals, and any other deliverables associated with a contractor's bid or proposal
- Information obtained to determine reasonableness of price [FAR 24.202(b)]
- Trade Secrets [FAR 15.506(e)(1) and DoD 5200.1-R, Appendix C]
- Privileged or confidential manufacturing processes and techniques [FAR 15.506(e)(2)]
- Commercial and financial information that is privileged or confidential [FAR 15.506(e)(3)] – including unit pricing
- Names of individuals providing past performance information [FAR 15.506(e)(4)]
- Classified information relevant to national security [DoD 5220.22-M, DoD 5220.22-R, and FAR 4.4]

DoD Regulation 5200.1-R, Appendix C, Section 2 describes the nine FOIA exemptions for information that is unclassified but considered 'for official use only' – one of which is:

Information such as trade secrets and commercial or financial information obtained from a company on a privileged or confidential basis that, if released, would result in competitive harm to the company, impair the government's ability to obtain like information in the future or to protect the government's interest in compliance with program effectiveness.

While the FAR is unclear as to the definition of trade secrets and in practice seems to have left it to the agencies to determine what this covers, the Economic Espionage Act of 1996 (18 USC 1831-39) defines trade secrets as all forms and types of financial, business, scientific, technical, economic or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if:

- The owner thereof has taken reasonable measures to keep such information secret, and;

- The information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by the public.

It bears repeating at this point that one of the underlying statutory protective devices prohibiting the public release of confidential information imposes criminal fines and possible imprisonment, as well as termination of employment, for employees of the government who disclose confidential information. It is therefore difficult to imagine that the Councils would willingly place government employees needlessly at risk by not providing for the most rigorous screening process presently available: FOIA procedures, at least with respect to issues of confidentiality. It might be useful to quote the statutory proscription at 18 U.S.C. 1905:

Whoever, being an officer or employee of the United States or of any department or agency thereof, any person acting on behalf of the Office of Federal Housing Enterprise Oversight, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. 1311-1314), or being an employee of a private sector organization who is or was assigned to an agency under chapter 37 of title 5, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment.

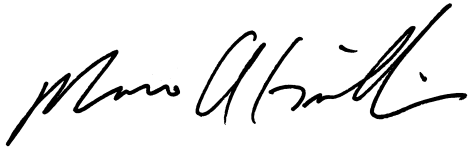
As you are aware, agencies will sometimes post their contracts on their websites. In the experience of many of our members such decisions are always preceded by a FOIA-like review and redaction process. Although such a time-consuming process may seem burdensome to the government and to industry, the consequences of not doing so would be far more than burdensome; they could result in criminal fines or penalties for government employees and extraordinarily heavy cost to the government, individuals and industry, as alluded to in the OMB memorandum, which is repeated here for the sake of emphasizing the issues that are at stake with this ANPR:

"Moreover, nothing in this Directive shall be construed to suggest that the presumption of openness precludes the legitimate protection of information whose release would threaten national security, invade personal privacy, breach confidentiality, or damage other genuinely compelling interests."

Conclusion

AGC appreciates the opportunity to submit comments on the advance notice of proposed rulemaking Councils issued May 13, 2010 AGC finds that the issues we present in our comments will avoid a great deal of confusion and complication for the Federal construction procurement process. Thank you again for considering AGC's views. The association would welcome the opportunity to provide additional information or support for the rulemaking process.

Sincerely,

A handwritten signature in black ink, appearing to read "Marco A. Giamberardino". The signature is fluid and cursive, with a prominent initial "M" and a stylized "G".

Marco A. Giamberardino, MPA
Senior Director
Federal and Heavy Construction Division